No. 92-1402

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

C & A CARBONE, INC.,
RECYCLING PRODUCTS OF ROCKLAND, INC.,
C & C REALTY, INC., and ANGELO CARBONE,
Petitioners,

v.

TOWN OF CLARKSTOWN,
Respondent.

On Writ of Certiorari to the Supreme Court,
Appellate Division, Second Department
of the State of New York

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether a municipal ordinance requiring delivery of locally discarded garbage to a designated treatment facility impermissibly discriminates against or unduly burdens interstate commerce in violation of the Commerce Clause of the United States Constitution.

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BRIEF FOR RESPONDENT

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of Local Laws, 1990, No. 9 of the Town of Clarkstown, New York ("Local Law 9") entitled "Solid Waste Transportation and Disposal," are pertinent to the resolution of this case:

Section 1. Definitions

Unless otherwise stated expressly, the following words and expressions, where used in this chapter, shall have the meanings ascribed to them by this section:

ACCEPTABLE WASTE—All residential, commercial and industrial solid waste as defined in New York State Law, and Regulations, including Construction and Demolition Debris. Acceptable Waste shall not include Hazardous Waste, Pathological Waste or sludge.

CONSTRUCTION AND DEMOLITION DEBRIS—Uncontaminated solid waste resulting from the construction, remodeling, repair and demolition of structures of roads; and uncontaminated solid waste consisting of vegetation resulting from land clearing and grubbing, utility line maintenance and seasonal and storm related cleanup. Such waste includes, but is not limited to, bricks, concrete and other masonry materials, soil, rock, wood, wall coverings, plaster, drywall, plumbing fixtures, non-asbestos insulation, roofing shingles, asphaltic pavement, electrical wiring and components containing no hazardous liquids, metals, brush grass clippings and leaves that are incidental to any of the above.

HAZARDOUS WASTE—All solid waste designated as such under the Environmental Conservation Law, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, the Resource Conservation and Recovery Act of 1976 or any other applicable law.

PATHOLOGICAL WASTE—Waste material which may be considered infectious or biohazardous, originating from hospitals, public or private medical clinics, departments or research laboratories, pharmaceutical industries, blood banks, forensic medical departments, mortuaries, veterinary facilities and other similar facilities and includes equipment, instruments, utensils, fomites, laboratory waste (including pathological specimens and fomites attendant thereto), surgical facilities, equipment, bedding and utensils (including pathological specimens and disposal fomites thereto), sharps (hypodermic needles, syringes, etc.), dialysis unit waste, animal carcasses,

offal and body parts, biological materials, (vaccines, medicines, etc.) and other similar materials, but does not include any such waste material which is determined by evidence satisfactory to the Town to have been rendered non-infectious and non-biohazardous.

PERSONS—Any individual, partnership, corporation, association, trust, business trust, joint venturer, governmental body or other entity, howsoever constituted.

UNACCEPTABLE WASTE—Hazardous Waste, Pathological Waste and sludge.

SLUDGE—Solid, semi-solid or liquid waste generated from a sewage treatment plant, wastewater treatment plant, water supply treatment plant, or air pollution control facility.

TOWN—When used herein, refers to the Town of Clarkstown.

Section 2. General Provisions

A. Intent; Purpose.

I. The intent and purpose of this chapter is to provide for the transportation and disposition of all solid waste within or generated within the Town of Clarkstown so that all acceptable solid waste generated within the Town is delivered to the Town of Clarkstown solid waste facility situate at Route 303, West Nyack, New York and such other sites, situate in the Town, as may be approved by the Town for recycling, processing or for other disposition or handling of acceptable solid waste.

II. The powers and duties enumerated in this law constitute proper town purposes intended to benefit the health, welfare and safety of Town residents. Additionally, it is hereby found that, in the exercise of control over the collection, transportation and disposal of solid waste, the Town is exercising essential and proper governmental functions.

B. Supervision and Regulation.

The Town Board hereby designates the Director of the Department of Environmental Control to be responsible for the supervision and regulation of the transportation and disposition of all acceptable waste generated within the Town of Clarkstown. The Director of Environmental Control shall be responsible for and shall supervise the Town's activities in connection with any waste collection and disposal agreements entered into between the Town and third parties and shall report to the Town Board with respect thereto.

C. Power to Adopt Rules and Regulations.

The Town Board may, after a public hearing, adopt such rules and regulations as may be necessary to effectuate the purposes of this chapter. At least seven (7) business days' prior notice of such public hearing shall be published in the official newspaper of the Town. A copy of all rules and regulations promulgated hereunder and any amendments thereto shall be filed in the office of the Town Clerk upon adoption and shall be effective as provided therein.

Section 3. Collection and Disposal of Acceptable Waste.

A. The removal, transportation and/or disposal of acceptable waste within or generated within the Town of Clarkstown shall be exclusively disposed of, controlled and regulated by the Town under this chapter and Chapter 50 and Chapter 82 of the Clarkstown Town Code, together with such rules and regulations as the Town has or may from time to time adopt.

B. All acceptable waste, as defined herein, except for construction and demolition debris, shall be removed, transported and/or disposed of only by carters licensed pursuant to the requirements of Chapter

50 of the Clarkstown Town Code and any amendments thereto. All other persons are hereby prohibited from removing, transporting or disposing of acceptable waste, except for construction and demolition debris generated within the Town of Clarkstown, and except as may be provided for herein or in the rules and regulations adopted pursuant to this chapter and/or Chapter 50 of the Clarkstown Town Code.

C. All acceptable waste generated within the territorial limits of the Town of Clarkstown is to be transported and delivered to the Town of Clarkstown solid waste facility located at Route 303, West Nyack, New York or to such other disposal or recycling facilities operated by the Town of Clarkstown, or to recycling centers established by special permit pursuant to Chapter 106 of the Clarkstown Town Code, except for recyclable materials which are separated from solid waste at the point of origin or generation of such solid waste, which separated recyclable materials may be transported and delivered to facilities within the Town as aforesaid, or to sites outside the Town. As to acceptable waste brought to said recycling facilities, the unrecycled residue shall be disposed of at a solid waste facility operated by the Town of Clarkstown.

D. It shall be unlawful to dispose of any acceptable waste generated or collected within the Town at any location other than the facilities or sites set forth in Paragraph "C" above.

Section 4. Disposal of Unacceptable Waste.

A. No unacceptable waste shall be delivered to the Town of Clarkstown solid waste facility situate at Route 303, West Nyack, New York or other solid waste facility operated by the Town of Clarkstown or recycling centers established by special permit pursuant to Chapter 106 of the Clarkstown Town Code by any person, including, without limitation, any licensed carter or any municipality. Failure to

comply with the provisions of this section shall be subject to the provisions with respect to such penalties and enforcement, including the suspension or revocation of licenses and the imposition of fines, in accordance with the provisions of this chapter and/or Chapter 50 of the Clarkstown Town Code and any amendments thereto. The Town Board of Clarkstown may, by resolution, provide for the disposal of sewer sludge, generated by a municipal sewer system or the Rockland County sewer district, at a disposal facility situate within the Town of Clarkstown.

B. It shall be unlawful, within the Town, to dispose of or attempt to dispose of unacceptable waste of any kind generated within the territorial limits of the Town of Clarkstown, except for sewer sludge as provided for in Section "A" above.

Section 5. Acceptable and Unacceptable Waste Generated Outside the Town of Clarkstown.

A. It shall be unlawful, within the Town, to dispose of or attempt to dispose of acceptable or unacceptable waste of any kind generated or collected outside the territorial limits of the Town of Clarkstown, except for acceptable waste disposed of at a Town operated facility, pursuant to agreement with the Town of Clarkstown and recyclables, as defined in Chapter 82 of the Clarkstown Town Code, brought to a recycling center established by special permit pursuant to Chapter 106 of the Clarkstown Town Code.

B. It shall be unlawful for any person to import acceptable waste or unacceptable waste from outside the Town of Clarkstown and dump same on any property located within the Town of Clarkstown and to proceed to sift, sort, mulch or otherwise mix the said material with dirt, water, garbage, rubbish or other substance, having the effect of concealing the contents of origin of said mixture. This provision

shall not apply to composting of acceptable waste carried out by the Town of Clarkstown.

Section 6. Fees for Disposal of Acceptable Waste at Town Operated Facilities.

There shall be separate fees established for disposal of acceptable waste at Town operated disposal facilities. The Town Board, by resolution adopted from time to time, shall fix the various fees to be collected at said facilities. The initial fees to be collected are those adopted by the Town Board on December 11, 1990 by Resolution Number 1097.

Section 7. Penalties for Offenses.

Notwithstanding any other provision of this chapter, the violation of any provision of this chapter shall be punishable by a fine of not more than one thousand dollars ($1,000.00) or by imprisonment for a period not exceeding fifteen (15) days for each offense, or by both fine and imprisonment, and each day that such violation shall be permitted to continue shall constitute a separate offense hereunder.

Section 8. Repealer; Severability.

Ordinances and local laws or parts of ordinances or local laws heretofore enacted and inconsistent with any of the terms or provisions of this chapter are hereby repealed. In the event that any portion of this chapter shall be declared invalid by a court of competent jurisdiction, such invalidity shall not be deemed to affect the remaining portions hereof.

Section 9. When Effective.

This chapter shall take effect immediately upon filing in the office of the Secretary of State.

Appendix to Petition for *Certiorari* ("Pet. App.") 48a-53a; Record ("R.") 64-70.[1]

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[1] Although only Section 3A is at issue here, we present the entire text of the Ordinance because Petitioners and their *amici*, the Chemical Manufacturers of America, *et al.*, ("CMA"), argue that

STATEMENT OF THE CASE

Clarkstown, New York, historically provided a local facility for disposal of garbage discarded within its town limits. This service was provided from the 1950's until 1990 by a Town-owned landfill. Joint Appendix ("J.A.") 24. The landfill began to create environmental concerns in the 1980's and was the subject of litigation brought by the New York Department of Environmental Conservation ("DEC") to resolve these concerns. J.A. 25. The remedy agreed to in the consent decree ending the litigation required the Town to close the landfill and build a transfer station facility capable of receiving all waste discarded in the Town and properly processing and shipping that waste either to recycling facilities or to authorized final disposal facilities. *Id.* Although it required dependence on outside private disposal sites for the foreseeable future, the Town believed that the transfer station would enable it to ensure implementation of its overall waste reduction and removal program, which includes recycling requirements and composting facilities. J.A. 94, 102.

The Town entered into a contract with Clarkstown Recycling, Inc., which provided for that firm to build and operate the new Town facility. J.A. 27. The transfer station began receiving municipal waste in January 1991. J.A. 25. The Town based the size of the facility on its best estimate of the amount of garbage that would be generated within its limits. It determined that to finance the construction of the facility it would need to guarantee enough tonnage to the operator at an authorized "tipping" charge per ton to induce the operator to commit its

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Section 5A creates an unlawful discrimination against imported non-Clarkstown waste. Petitioners' Brief ("Pet. Brief") 3, 23; Brief for *Amici Curiae* CMA, *et al.* 6-8. The CMA *amicus* brief misreads (or simply fails to read) the Ordinance. Section 5A's reference to out-of-state "unacceptable" waste is entirely meaningless because Sections 4A and 4B also prohibit local disposal of *any* "unacceptable" solid waste, whether originating inside or outside Clarkstown.

capital to the project. J.A. 10-11. At the expiration of the contract the Town may take over the facility for a nominal price. Pet. App. 4a.[2]

As part of its overall plan for handling and monitoring all Clarkstown waste and ensuring full local utilization of the new facility, which was also necessary to enable the Town to meet its guarantee of tonnage to the operator, the Town enacted several measures. One law specifies that this Town-designated facility would be the only transfer facility in the Town. The other, Clarkstown Local Law No. 9 ("the Ordinance"), at issue in this case, seeks to ensure that this facility will be fully utilized for its intended purpose. Pet. App. 4a-5a. The State of New York subsequently recognized Clarkstown's need to exert exclusive control over its waste flow with passage of the Holland-Gromack Law, which specifically authorizes all municipalities in Rockland County to require that all waste generated within the municipality be delivered to a designated facility.[3]

The Ordinance applies to the non-recyclable residue of solid waste, typically referred to as garbage or trash. It specifies that any garbage that is discarded within the Town limits must be delivered to the Town-designated facility. Local Law 9, Sections 3C and 3D. Waste becomes subject to the Ordinance either when it is put out by Clarkstown residents or businesses for collection or when a "recycling center" with a Town permit completes the removal of any valuable recyclable ingredients from waste and is ready to dispose of the residue. Local Law 9, Sections 3A and 3B. Any resident or business in

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[2] The decision of the Supreme Court, Appellate Division, Second Department, of the State of New York, rendered on August 31, 1992, is reported at 182 A.D.2d 213 and 587 N.Y.S.2d 681, and is reproduced at Pet. App. 1a-15a. The decision of the court of original jurisdiction, the Supreme Court of the State of New York, County of Rockland, is unreported and is reproduced at Pet. App. 22a-33a. The opinion of that court upon reargument is unreported and is reproduced at Pet. App. 16a-21a.

[3] 1991 N.Y. Laws 569.

Clarkstown is free to remove any valuable recyclables from its own waste and to sell them anywhere. Any business in Clarkstown which has a permit to act as a "recycling center" may receive local waste or bring in waste from out of town and out of state, remove the valuable recyclable ingredients from that waste, and sell such recyclables anywhere it wishes. The Ordinance allows all "acceptable" waste to be brought to the Town's designated facility without regard to its place of origin. Local Law 9, Section 3C. Hazardous or pathological waste, whether originating in the Town or elsewhere, is not "acceptable" for delivery to the Town's facility or any other facility in the Town. Local Law 9, Sections 4 and 5. The fees, charges and other provisions of the Ordinance apply no differently to waste originating within Clarkstown than to waste originating outside the Town.

In 1987 Petitioners began to operate a facility in Clarkstown under a state permit allowing them to receive waste containing approximately ninety percent recyclable cardboard, to separate out and sell the cardboard and other recyclables and to send the residue to a final disposal site. J.A. 124. Petitioners sought a special Town permit for their operation which the Town Board denied, J.A. 68, amid citizen fears that the facility would in fact be a transfer station or a "dump" causing serious traffic, odor and other problems. J.A. 34-38. This permit denial was set aside by a local court order, and that case is pending appeal by the Town. J.A. 112-15. In 1991 the state DEC threatened to revoke Petitioners' permit upon finding that Petitioners had been handling a significantly higher percentage of non-recyclables (seven times greater) than was authorized under their state permit. J.A. 124-25. In March, 1991, when a truck hired by Petitioners collided with an overpass on the nearby Palisades Parkway, the Town discovered that Petitioners were in violation of the Ordinance in failing to bring their residues to the Town's designated disposal facility. J.A. 14-15. The Town also discovered that Petitioners were illegally using their Clarkstown facility as a transfer station and that much of the

waste Petitioners were bringing to their Clarkstown facility was being transported in violation of New Jersey solid waste laws.[4] Petitioners claimed that they had been able to dispose of their non-recyclable residues outside of Clarkstown at a price lower than that charged by the Clarkstown transfer station, which enabled them to charge a price for disposal to their customers of $11 per ton less than Clarkstown's price. Pet. App. 35a.

The Town filed suit to enjoin these violations of the Ordinance and the operation of the Petitioners' facility as a transfer station. The New York Supreme Court for Rockland County, having determined that the Ordinance was a valid exercise of the Town's police power and not in violation of the Commerce Clause of the United States Constitution, granted injunctive relief. Pet. App. 32a. New York's Appellate Division for the Second Judicial Department affirmed. Pet. App. 14a-15a. Petitioners sought review by this Court in a petition for *certiorari*, which was granted on May 24, 1993.[5]

SUMMARY OF ARGUMENT

This case deals with a municipality's efforts to dispose of a menace to its residents—garbage. Garbage smells—

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[4] Clarkstown alleged at trial, and Carbone did not dispute, that the waste Carbone was bringing to its Clarkstown facility in violation of its New York permit was in significant part waste from Bergen County, New Jersey, which Carbone was shipping in violation of New Jersey regulations designating a particular disposal site for that waste under New Jersey's comprehensive solid waste program. Pet. App. 26a; J.A. 17-18.

[5] In a separate case, mooted by the decision of the state court, a federal district court preliminarily enjoined enforcement of the Ordinance. *C & A Carbone, Inc. v. Town of Clarkstown*, 770 F. Supp. 848, 855 (S.D.N.Y. 1991) (reproduced at Pet. App. 34a-46a). The court assumed without deciding that Clarkstown had a right to require local treatment of local waste, but believed that the application of the Ordinance to waste brought in from outside the Town presented a Commerce Clause problem. Pet. App. 43a.

improperly handled, it makes life unbearable to nearby residents. Improperly managed, it is a breeding ground for rats, public health-threatening insects and disease. Rain water which has run through improperly stored garbage picks up materials from it and pollutes streams and groundwater. In its decay, garbage emits explosive, environmentally damaging and often hazardous gases. For all these reasons its proper disposal is one of the principal challenges to municipalities. This case stripped to its core presents this question: whether a local governmental unit in performing its obligation to provide safe long term waste disposal services is empowered to require all garbage generated within its borders to be delivered to the facility it has designated as most protective of the health and safety of its residents.

The Ordinance applies solely to locally discarded garbage prior to any entry into commerce. The delivery of local garbage by private collection firms to the Town facility as required by the Ordinance, whether the garbage was originally discarded in Clarkstown or consists of the residue of garbage discarded after waste originating outside Clarkstown is deposited in the Town and sorted for recyclables, is a transaction distinct and separate from the subsequent shipment of the consolidated garbage to final disposal sites. Whether characterized as a measure establishing a physically separate local transaction, a "quarantine" of local garbage which operates to withhold it from commerce, or a limitation on the ability of private firms to participate in this portion of the local waste removal process, the Ordinance does not discriminate against or burden interstate commerce.

The Ordinance is not a protectionist measure. In contrast to state laws restricting the availability of scarce landfill capacity to out-of-state waste, which this Court struck down in *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), the Ordinance contains no geographic or other classification which on its face confers any ad-

vantage or preference upon local interests. It is not discriminatory in purpose because the Town is not a "competitor" receiving an "advantage." Local garbage is not a commodity anyone is competing to buy or sell. The Town's sole "interest" is in carrying out its core police power responsibility to get rid of the community's garbage safely. Petitioners' interest is to earn revenues by shipping garbage to disposal sites. These interests are "incommensurate."[6] That the Ordinance may help the Town to succeed in its task and thereby reduce Petitioners' commercial opportunities as a business operating in Clarkstown does not demonstrate a protectionist purpose.

The absence of a protectionist purpose is most clearly evidenced by the effect of the Ordinance, which is to burden Clarkstown residents primarily, if not exclusively, with the higher costs of the Town's waste disposal program. They are willing to bear the costs of a program which the Town government believes is appropriate to implement state and local requirements for recycling and disposal of garbage; if they decide that the Town government's plan is less effective or more costly than it should be, they have the votes to change it.

For our entire history as a nation, cities and towns have been exercising broad control over garbage collection and disposal, and hundreds of court cases, including those of this Court in *California Reduction* and *Gardner*,[7] have upheld laws severely limiting or even precluding private participation in this field in deference to the core responsibility of local governments. Congress and the federal Environmental Protection Agency have repeatedly expressed this deference to local governmental responsibility to address the solid waste problem. The Clarkstown Ordinance represents a traditional exercise of that govern-

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[6] *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

[7] *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905); *Gardner v. Michigan*, 199 U.S. 325 (1905).

mental responsibility. To claim that its exercise confers an "advantage" on Clarkstown or that the Town has created an "export restraint" is to apply commercial concepts entirely inapposite to local government's responsibility to deal with garbage.

If the decision in this case turns upon application of the "balancing" process of *Pike v. Bruce Church, Inc.*,[8] we submit that however difficult it may be to weigh the competing governmental and private interests generally, it is plain on the record that Petitioners have shown such a slight burden on commerce, if any, that the legitimacy of the Town's interest and the "putative benefits" to Clarkstown residents are not drawn into issue. In any case, those benefits are well established in this record and easily outweigh any purported burden on interstate commerce.

Petitioners have no claim that interstate commerce in garbage disposal services is involved in the "balancing" here or that out-of-state disposal firms (not parties in this case) have any interest at stake because the Clarkstown transfer station sends its consolidated garbage to out-of-state disposal sites just as Petitioners do. This Court's *Exxon*[9] decision makes clear that the Commerce Clause is not violated by laws regulating the manner in which locally regulated firms engage in interstate commerce, notwithstanding a shifting of commercial opportunities.

Though they are a local Clarkstown business in terms of the application of the Ordinance, Petitioners term themselves interstate "brokers" of garbage services and complain basically of Clarkstown's choice of a waste handling program which does not reflect a "free trade" policy. They point to two of the wealthiest counties in the country whose choose to tax-subsidize their waste disposal facilities as evidence that "flow control" is unnecessary. Their allies, the Chemical Manufacturers Association ("CMA"), quite remarkably urge that the cities' "parochial financial concerns" are standing in the way of their industry's concerns for environmental safety. Brief for *Amici Curiae* CMA, *et al.* 4-5. They are fearful that these "flow control" laws will somehow reduce distant landfill capacity for smaller towns who cannot afford their own programs. These arguments run the spectrum from fanciful to outrageous. Their generous offer to take over the waste handling responsibility of local governments is just not acceptable to the public or to the local governments it elects.

[8] 397 U.S. 137 (1970).

[9] *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 127 (1978).

Nor does the Commerce Clause dictate any such transfer of responsibility. Referring to this Court's *Exxon* decision, one writer observed that "the negative implications of the commerce clause derive principally from a *political* theory of union, not from an *economic* theory of free trade. The function of the clause is to ensure national solidarity, not economic efficiency."[10] At stake in this case is the traditional role of local governments in having responsibility *and* control for garbage removal versus the interest of the private waste services sector in substituting "free trade" as a preferred system. The Court is not required here to join an economic or policy debate as to the future of garbage handling in America. It need only recognize the legitimate local governmental function in the handling of locally discarded garbage, which negates a protectionist purpose or an impermissible burden on interstate commerce.

[10] Laurence H. Tribe, *American Constitutional Law* 417 (2d ed. 1988); *see also, Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522-23 (1935).

ARGUMENT

I. THE ORDINANCE IS AN EXERCISE OF LOCAL POLICE POWER WHOSE EFFECT IS TO PRECLUDE THE ENTRY OF LOCALLY DISCARDED GARBAGE INTO COMMERCE UNTIL SHIPPED BY THE TOWN'S FACILITY.

This Court's Commerce Clause decisions include three closely related doctrines, any one of which calls for a threshold determination here that the subject garbage, by force of the Clarkstown Ordinance, does not enter commerce and become subject to the negative Commerce Clause until it is shipped out of the facility to final disposal sites. First, the Ordinance intervenes before locally discarded garbage enters commerce; second, the Ordinance operates as a nondiscriminatory "quarantine" of local garbage which withholds it from commerce; and, third, this exercise of the police power affects the nature of private interests that may attach to locally discarded garbage and, as such, precludes commerce in the local garbage prior to its arrival at the Town's designated facility.

A. Locally Discarded Garbage Has Not Entered Commerce As Of The Time The Ordinance Has Application.

Garbage required by the Ordinance to be brought to the Town's facility is treated as discarded or "generated" under Section 3C of the Ordinance when it is placed for collection in the generators' garbage containers or is otherwise ready for removal after sorting for recyclables. Private collection firms, operating under permits issued by the Town, are on notice by the Ordinance and the conditions of their permits that such discarded material is to be delivered to the Town transfer station. The "transaction" involved in this case is therefore the movement from the "curb" of the waste generator in the Town to the Town's designated facility.

In *Parker v. Brown*, 317 U.S. 341 (1943), the Court held that a state program restricting the volume of raisins moving from California growers to California processors did not offend the Commerce Clause, despite the direct impact on the flow of raisins to out-of-state purchasers, because the raisins had not reached interstate commerce at the point they were affected by the state measure. The Court noted its earlier decisions in which regulations affecting manufacturing and production operations were upheld though "they had the effect of preventing commerce in the regulated article." *Champlin Refining Co. v. Corporation Commission of Oklahoma*, 286 U.S. 210 (1932); *Sligh v. Kirkwood*, 237 U.S. 52 (1914); *see Capital City Dairy Co. v. Ohio*, 183 U.S. 238, 245 (1902); *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 77 (1937); *cf. Bayside Fish Flour Co. v. Gentry*, 297 U.S. 422 (1936). In other decisions of this Court and lower federal courts the legal separateness of an intrastate transaction prior to entry of goods into interstate commerce has been recognized.[11] These cases, and especially *Parker*, support the conclusion that the Clarkstown garbage has not entered interstate commerce at the Ordinance's point of impact, and that its travel to the Clarkstown transfer station is a wholly intrastate transaction distinct and separate from the subsequent transaction in which Clarkstown ships it to an out-of-state disposal site. As to the garbage or "residue" remaining for disposal at the Carbone facility in Clarkstown after removal of recyclable material, it has "come to rest" in terms of its previous status as out-of-state waste and now has no different character than any other garbage "generated" in Clarkstown.[12]

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[11] *See Kidd v. Pearson*, 128 U.S. 1, 25 (1888); *Coe v. Town of Errol*, 116 U.S. 517, 528-29 (1886); *United States v. Seven Barrels, etc. of Spray Dried Whole Egg*, 141 F.2d 767, 770 (7th Cir. 1944); *Young v. Kellex Corp.*, 82 F. Supp. 953, 959 (E.D. Tenn. 1948).

[12] *Wilson v. Commissioner of Internal Revenue*, 564 F.2d 1317 (9th Cir. 1977), *cert. denied*, 439 U.S. 832 (1978); *Clyde v. Brod-*

B. The Ordinance Is In Effect A "Quarantine" Measure Which Precludes Locally Discarded Garbage From Entering Commerce.

In *Philadelphia,* 437 U.S. at 623-24, this Court rejected the argument that a state could distinguish its local waste and out-of-state waste on the basis that the latter posed a different menace than the former and should be quarantined. But in that case, and more recently in *Chemical Waste Management, Inc. v. Hunt,* 112 S. Ct. 2009, 2016-17 (1992), the Court explained that the so-called "quarantine cases" were not obsolete, but they simply did not condone discrimination. *Philadelphia,* 437 U.S. at 629; *Illinois v. General Electric Co.,* 683 F.2d 206, 214 (7th Cir. 1982), *cert. denied,* 461 U.S. 961 (1983).[13] As the Court said in *H.P. Hood & Sons v. Du Mond,* 336 U.S. 525, 535 (1949), referring to the "hoarding" cases, "when a state recognizes an article to be a subject of commerce, it cannot prohibit it from being a subject of interstate commerce." Conversely, an absolute quarantine of all articles of a particular kind—a rationally based, categorical removal of all such articles from public commerce—should be upheld under this Court's Commerce Clause decisions.

A law such as Clarkstown's is exactly that: an absolute quarantine of a disfavored object, locally discarded garbage. The "quarantine" does not keep offending articles out of the jurisdiction—given that the daily generation of

erick, 144 F.2d 348, 351 (10th Cir. 1944). *See also United States v. Garber,* 626 F.2d 1144, 1148 (3d Cir. 1980), *cert. denied,* 449 U.S. 1079 (1981); *United States v. Tobin,* 576 F.2d 687 (5th Cir.), *cert. denied,* 439 U.S. 1051 (1978); *Jewel Tea Co. v. Williams,* 118 F.2d 202, 207 (10th Cir. 1941). In *Schechter Poultry Corp. v. United States,* 295 U.S. 495, 543 (1935), this Court noted that the "mere fact that there may be a constant flow of commerce does not mean that flow continues after . . . [commingling] . . ." *Id.*

[13] "The hostility is to the thing itself, not to merely interstate shipment of the thing; and an undiscriminating hostility is at least nondiscriminatory." 683 F.2d at 214.

garbage by its residents makes that impossible—but it operates to preclude those articles from any further exposure in the Town by mandating a system of safe handling through the Town's transfer facility. Regardless of its origin, garbage discarded in Clarkstown is prohibited from any use other than delivery to the Town's designated facility. In purpose, substance and effect this is the permissible nondiscriminatory quarantine this Court recognized in *Chemical Waste,* 112 S. Ct. at 2016-17, where it quoted the following passage from *Guy v. Baltimore,* 100 U.S. 434, 443 (1880): "In the exercise of its police powers, a State may exclude from its territory, or prohibit the sale therein of any articles which, in its judgment, fairly exercised, are prejudicial to the health or which would endanger the lives or property of its people." Such an exercise of a community's "self protecting power," *Sligh v. Kirkwood,* 237 U.S. at 60, necessarily precludes the entry of such garbage into commerce during the application of the Town's law which specifies its manner of handling.

C. The Effect Of The Police Power Exercise Here Is To Limit The Opportunities Of Private Persons To Engage In Commerce In Locally Discarded Garbage And, As Such, Operates To Withhold This Garbage From Commerce.

Justice Holmes observed, in *Hudson County Water Co. v. McCarter,* 209 U.S. 349, 357 (1908), that: "A man cannot acquire a right to property by his desire to use it in commerce among the states . . . [or] enlarge his otherwise limited and qualified right to the same end."[14] In *Sporhase v. Nebraska ex rel. Douglas,* 458 U.S. 941, 953 (1982), this Court commented that the effect of state law on the nature of private interests that attach to local

[14] *Quoted in Sporhase v. Nebraska ex rel. Douglas,* 458 U.S. 941, 947 (1982). Justice Holmes added: "The limits set to property by other public interests present themselves as a branch of what is called the police power of the state." 209 U.S. at 355.

groundwater "[is] not irrelevant in the Commerce Clause inquiry," although the Court concluded that Nebraska's argument that its water was thus not an article of commerce "goes too far" in that it would "not only exempt Nebraska groundwater regulation from burden-on-commerce analysis, it would also curtail the affirmative power of Congress to implement its own policies concerning such regulation." Noting that the affirmative power of Congress to regulate commerce "may reach a good deal further than the mere negative impact of the Commerce Clause in the absence of any action by Congress," the dissent suggested that "a state may so regulate a natural resource as to preclude that resource from attaining the status of an 'article of commerce' for the purposes of the negative impact of the Commerce Clause." *Id.* at 962, 963 (Rehnquist, J., dissenting). Garbage is not a natural resource by any stretch of the term.[15] If there is such a basis to withhold a natural resource from treatment as an "article of commerce," there should be all the more reason to permit a state or local government to pursue a vital health and safety program the effect of which is to preclude garbage "from attaining the status." *Id.*

Garbage should be treated as garbage under the Commerce Clause as under any other part of the Constitution. It is entirely consistent with *Philadelphia* and related decisions for this Court to consider the particular attributes of garbage and to differentiate between garbage as such, the business of moving garbage and the value or scarcity of resources for its disposal in applying the negative Commerce Clause.[16] Garbage, itself, is not in demand by any-

[15] If *cement* is not a natural resource, *Reeves, Inc. v. Stake*, 447 U.S. 429, 443 (1980), certainly garbage is not either.

[16] While *Philadelphia* stands for the proposition that all "objects of interstate commerce merit Commerce Clause protection," the Court noted in that decision that such constitutional scrutiny will result in case-specific resolutions allowing for differential treat-

one.[17] It is "in commerce" only in the sense that a commercial need for businesses to get rid of its exists and these businesses operate in commerce. The Court's concept of "economic protectionism" should be applied to garbage in a practical manner.[18] A state or local govern-

ment of items in certain contexts. 437 U.S. at 622-23, 628-29. *Sporhase* represents one category of differential treatment. Another is reflected in the "market participant" cases, for example, which limit Commerce Clause application where the article of commerce is sold or purchased by the state that acts as a proprietor rather than as a regulator. *White v. Massachusetts Council of Construction Employers*, 460 U.S. 204 (1983); *Reeves, Inc. v. Stake*, 447 U.S. 429; *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). Those cases also provide analogous support for recognition of the local governmental role in managing its waste disposal program and defining private commercial involvement in that process as it deems appropriate.

[17] Recyclable cardboard, paper, metals, and glass have value once removed from mixed municipal waste, but even before removal they do not come close to creating positive value in the whole. Indeed, the "value" of recyclables, while certainly relevant in the economics of separation and resale, is a secondary consideration in their removal. Primary interests consist of reducing the volume that must be landfilled or incinerated, *see* Office of Solid Waste, United States Environmental Protection Agency, *The Solid Waste Dilemma: An Agenda for Action* 18 (1989) (*"Agenda for Action"*), reducing the need for energy to produce virgin articles, and reducing the use of natural resources such as timber. The cost per ton of waste disposal is not going down—*i.e.*, garbage is not declining in "negative value"—as more recyclable ingredients are being recovered. The combined impact of declining landfill space, *id.* at 14, more stringent environmental standards for all types of waste disposal and the enormous cost of recycling operations themselves, continues to increase the cost of garbage disposal. *Id.* at 12. In any event, Clarkstown's ordinance, typical of those used by most cities, operates only on the post-recycled residue, which means the garbage it impacts is that having the maximum "negative value."

[18] "[P]ractical considerations, however screened by doctrine, underlie resolution of conflicts between state and national power." Felix Frankfurter, *The Commerce Clause Under Marshall, Taney and Waite* 33-34 (1937), *quoted in Hughes v. Alexandria Scrap Corp.*, 426 U.S. at 828.

ment's good faith "preemption" of private opportunities in handling garbage after it is discarded, by prescribing a method of local disposal or treatment in the interest of public health and safety, is effective to preclude private actions which would implicate commerce.[19]

If private firms claim that this limitation on their ability to engage in commerce in waste removal services infringes their constitutional rights, their focus should be on the Fourteenth Amendment Due Process and Taking Clauses, not the Commerce Clause. The rights of private garbage collectors or "brokers" under the Fourteenth Amendment to be free of such regulation or to be compensated for any ownership interest they might claim in the garbage they have collected have been addressed by this Court in *California Reduction,* 199 U.S. 306, and *Gardner,* 199 U.S. 325, and in many lower federal and state court decisions, with the consistent result that governmental control of garbage collection and/or disposal, even to the complete exclusion of private collectors from the business, has been held a proper exercise of the police power and not a taking.[20]

II. MANDATORY LOCAL DISPOSAL OF LOCALLY DISCARDED GARBAGE DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE.

If one assumes, *arguendo,* that garbage generated in Clarkstown enters interstate commerce when it passes from local residents to the local facility, the first issue to be considered according to this Court's Commerce

[19] Therefore, at the point of disposal, the trash "has not existed, and does not . . . exist, for purposes of trade." *Young v. Kellex Corp.,* 82 F. Supp. at 959. *Cf. United States v. Seven Barrels, etc. of Spray Dried Whole Egg,* 141 F.2d at 770 (holding that there is no interstate commerce where no one is "permitted" legally to sell or purchase" the items in question).

[20] *See, e.g., Hybud Equip. Corp. v. City of Akron,* 654 F.2d 1187, 1192 (6th Cir. 1981), *vacated,* 455 U.S. 931 (1982), *on remand,* 742 F.2d 949 (6th Cir. 1984), *cert. denied,* 471 U.S. 1004 (1985).

Clause precedent is whether the Ordinance is a measure which discriminates against interstate commerce or whether, if it affects commerce at all, it incidentally burdens commerce. The Court has expressed the "negative" Commerce Clause's pivotal concept of discrimination on many occasions and in many ways, but the consistent theme has been that it prohibits "economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." [21]

In considering whether unconstitutional discrimination exists, the Court distinguishes "between the power of the State to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage. . . ." *H.P. Hood,* 336 U.S. at 533. This is a distinction "deeply rooted in both our history and our law . . ." *Id.* In deciding on which side of the "deeply rooted" distinction a particular measure lies, the Court has looked first for facial evidence of a protectionist purpose, *Hughes v. Oklahoma,* 441 U.S. 322, 337 (1979), then to actual protectionist purpose, *New England Power Co. v. New Hampshire,* 455 U.S. 331, 339 (1982); *Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333, 352-53 (1977); *H.P. Hood,* 336 U.S. at 530-31, and finally to protectionist effects, *Philadelphia,* 437 U.S. at 626-27.

In contrast to the Petitioners' view that a stoppage of articles moving in interstate commerce, as such, constitutes unconstitutional discrimination, Pet. Brief 17-18, the Court has made clear repeatedly and recently [22] that a state or community does not discriminate by stopping or reducing the flow of *all* like articles moving in com-

[21] *New Energy Co. v. Limbach,* 486 U.S. 269, 273 (1988).

[22] *Chemical Waste,* 112 S. Ct. at 2017. *See Illinois v. General Electric Co.,* 683 F.2d at 214.

merce; rather, it is the preference of in-state interests over their competing counterparts in other states that is of critical relevance. "The nature of the burden is, constitutionally, more significant than its extent." *Pike,* 397 U.S. at 145. The principle applies equally to the withholding of articles of commerce, as the Court has shown in the so-called "hoarding" cases. Summarizing those decisions recently, the Court said, "The Commerce Clause of the Constitution . . . precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or to the products derived therefrom." *New England Power Co.,* 455 U.S. at 338.

In applying these settled principles, the Court must consider whether garbage is by its nature a commodity which, in being directed to a facility to be treated or discarded, presents any "advantage" or "preference" in the sense of the "protectionism" this Court has embodied in the constitutional concept of discrimination. Those involved in the treatment of garbage are protected by the Commerce Clause from protectionist measures such as those in *Philadelphia,* 437 U.S. 617, and *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources,* 112 S. Ct. 2019, 2026 (1992),[23] but the value of the

[23] "Of course, in *Philadelphia v. New Jersey,* the commerce in question was not trade in sewage or trash itself, but a service (waste disposal) or a resource (empty landfill space) of a different color." Tribe, *supra* note 10, at 245. In the import restraint cases it was irrelevant whether the "business arrangements" were viewed as "sales of garbage" or "purchases of transportation and disposal services" because the overall "commercial transactions" were obviously of "an interstate character." *Fort Gratiot,* 112 S. Ct. 2019. Here the "transactions" between Clarkstown and its resident garbage producers are significantly different in terms of "interstate character," the focus on garbage itself as the article in "demand" is evident, and a different constitutional context is present. At minimum it requires a fresh look at what "advantage" or "preference" means in the "protectionism" analysis. It also invites an open consideration of whether commerce is implicated at all. *See* Section I, *supra.*

landfill capacity or the need of the nonresident to have access to it does not render garbage itself a "natural resource." Nor does it require us to pretend that its producers or the local governments required to get rid of it consider it to be of any value such that they wish to have "preferred access" or any other "advantage" in respect to it or that they wish to capture for in-state interests the business of "processing" it.

A community which decides to undertake a garbage recycling and disposal program such as Clarkstown's has voted to pay an added price for environmental quality.[24] It has made a determination that competitive pressures can create incentives for environmentally damaging shortcuts, which it hopes to diffuse by mandating handling by a single disposal facility which is not subject to competitive price considerations. It has voted to accept a short-term economic disadvantage for long-term economic and environmental benefits. To say that it gains some "advantage" or "benefit" in the sense of constitutional "protectionism" by exercising this responsibility is nonsensical. To say that a less costly, environmentally less protective program in another jurisdiction is "disadvantaged" also misses the point. Garbage will always flow to the cheapest legally permissible disposal option. The Commerce Clause should not be employed to force the cheapest option on communities who want to do better.

A. The Ordinance Does Not Discriminate On Its Face.

The Clarkstown Ordinance requiring local handling of locally discarded waste is not facially discriminatory because it contains no classification of garbage or generators

[24] *See* Blair P. Bremberg & David C. Short, *The Quarantine Exception to the Dormant Commerce Clause Doctrine Revisited: The Importance of Proofs in Solid Waste Management Cases,* 21 N.M. L. Rev. 63, 85-86 (1990); Charles T. DuMars, *State Market Power and Environmental Protection: A State's Right to Exclude Garbage in Interstate Commerce,* 21 N.M. L. Rev. 37, 57 (1990).

of garbage based upon geographic origin or residency.[25] This immediately distinguishes this case from *Philadelphia*, 437 U.S. 617, *Fort Gratiot*, 112 S. Ct. 2019, and *Chemical Waste*, 112 S. Ct. 2009, and practically every other decision of this Court in which discrimination was found. The Ordinance takes no account of the origin of the garbage it applies to; the singular test of application is whether the garbage is "generated"—its owner has no economic or other use for it—and it is now ready for final disposal in some manner that will require payment for the disposal function. It has "negative value." Since the Ordinance applies only to garbage discarded within the Town limits, and has no application to garbage being transported through the Town, the measure can have no effect on garbage discarded in a neighboring town or state. The flat application of the Ordinance to all garbage discarded within the full jurisdictional limits of the Town's power makes it as evenhanded as this town or any town is capable of making any ordinance or regulation.

Nor does the Ordinance discriminate on its face by distinguishing between the Clarkstown garbage facility as a permissible recipient of locally discarded garbage and all other potential recipients. The Ordinance plainly does not distinguish between in-state and out-of-state firms, as in *Lewis v. B.T. Investment Managers, Inc.*, 447 U.S. 27 (1986). It would strain the meaning of "discrimination" considerably to argue that *designation* of a single permitted facility automatically establishes a geographic classification because the designated garbage facility is necessarily in one state and some potential competitive facilities are inevitably out-of-state. There is a vast difference

[25] "When a regulation is discriminatory on its face, the very terms of the regulation deal unequally with people inside and outside the state. There is no need to resort to any additional information—except perhaps matters known to practically everyone—to discern that the state has given an advantage to insiders." Michael E. Smith, *State Discrimination Against Interstate Commerce*, 74 Cal. L. Rev. 1203, 1239 (1986).

between sorting competitors along state or sub-state lines and designating an exclusive provider of service. The question of constitutional discrimination cannot be decided on the face of the Clarkstown Ordinance. The face is unclear until the overall context and purpose are disclosed, which means that, as in *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), the purpose and effect of the Clarkstown Ordinance are dispositive as to whether the Ordinance is protectionist, *i.e.*, discriminatory, or whether it is not.[26]

B. The Ordinance Is Not Protectionist In Purpose.

Petitioners contend that Clarkstown's kind of ordinance is a "new wrinkle" that cities have discovered to cash in on the waste disposal business that has come into existence as a result of the Court's striking down of discriminatory import measures.[27] This superficial appeal to the free enterprise ethic has the force of neither logic nor history. It defies logic that cities would *now* decide to enter the garbage business for profit amidst the deepening crisis of local landfills being exhausted and the vicious opposition to siting of new facilities. As this Court has recognized,[28] our national problem is not that cities and states are getting *into* the business of solving their garbage problems but that too many are unwilling to confront the political and financial difficulties of building transfer, energy recovery, composting, recycling, and other modern facilities that will contribute to an overall national solution.

[26] "[T]here is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach. In either situation the critical consideration is the overall effect of the statute on both local and interstate activity." *Brown-Forman Distillers v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986).

[27] Pet. Brief 13-15.

[28] *Philadelphia*, 437 U.S. 617; *Chemical Waste*, 112 S. Ct. 2009; and *Fort Gratiot*, 112 S. Ct. 2019.

Comprehensive and exclusive control by local government of the garbage disposal process is hardly a "new wrinkle." It has been a role of government throughout our nation's history, not as a commercial opportunity but as a core responsibility no less fundamental than police and fire protection.[29] "[L]iterally hundreds of reported cases have upheld the authority of local governments to monopolize and control local garbage collection," *Hybud*, 654 F.2d at 1192, and many of them deal with the exact practices from which Petitioners seek relief here. This Court's own decisions in *California Reduction*, 199 U.S. 306, and *Gardner*, 199 U.S. 325, are illustrative of the deference of the courts to efforts of local governments to deal with this endemic public health and safety problem

[29] In this case, the New York appellate court commented on the New York precedent for deferring to the broad exercise of police power in dealing with garbage disposal.

> Local governments have long been authorized to enact laws relating to the "safety, health and well-being of persons or property" [N.Y. Const., art. IX, § 2(c)(10)] and it is well settled that the regulation of solid waste collection and disposal, a function traditionally entrusted to State and local governments[,] . . . is fundamentally related to the public health and welfare. . . . Municipalities have thus heretofore been empowered to ban dumping[,] . . . to grant exclusive franchises for the collection of disposal of waste[,] . . . and to prohibit outright the establishment of commercial and private disposal facilities. . . .

Pet. App. 9a (citations omitted). *See also, e.g., Strub v. Village of Deerfield*, 167 N.E.2d 178. 180 (Ill. 1960); *City of Indianapolis v. Ryan*, 7 N.E.2d 974, 976 (Ind. 1937); *Troje v. City Council of Hastings*, 245 N.W.2d 596, 598-99 (Minn. 1976); *Marangi Bros. v. Board of Commissioners*, 110 A.2d 131, 138-39 (N.J. 1954); *City of Portsmouth v. McGraw*, 488 N.E.2d 472, 476 (Ohio 1986); *State ex rel. Moock v. City of Cincinnati*, 166 N.E. 583 (Ohio), *cert. denied*, 280 U.S. 578 (1929); *City of Spokane v. Carlson*, 436 P.2d 454, 457 (Wash. 1968); *Silver v. City of Los Angeles*, 217 Cal. App. 2d 134, 138, 31 Cal. Rptr. 545, 548 (1963); *United Sanitation Services, Inc. v. City of Tampa*, 302 So. 2d 435, 436 (Fla. Dist. Ct. App. 1974); *People v. A & C Trucking Co.*, 88 Misc. 2d 988, 994, 390 N.Y.S. 987, 993 (1977).

by requiring that waste generated within a particular jurisdiction be disposed of at a designated facility.

At least twenty-seven states have enacted legislation authorizing local municipalities to enact "flow control" ordinances to enable them to implement their local programs and as part of the state solid waste management plans mandated by Congress in the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. § 6901 *et seq.*[30] State and local governments' utilization of "flow control" has been of central importance in waste disposal plans for very important reasons. Facing not only its own local demands for an effective program, but also the planning and implementation requirements of state and federal law, a community can, through flow control, monitor the collection and disposal of all local garbage and assure that it is all managed properly.[31] Meeting state recycling and source reduction objectives would be hopeless if the disposition of local waste were unregulated.[32] Maintaining a dependable waste stream for high technology waste-to-energy, recycling or composting operations would be futile without public control of local waste flow.[33]

[30] Pet. Brief 14, note 8.

[31] *Cf. Agenda for Action, supra* note 17, at 14.

[32] *See Harvey & Harvey, Inc. v. Delaware Solid Waste Auth.*, 600 F. Supp. 1369, 1378-79 (D. Del. 1985) (citing general assembly findings in the Delaware Solid Waste Authority Act, which discuss the need for comprehensive state regulation of solid waste disposal in order to meet environmental goals).

[33] *See* Kelly Outten, Note, *Waste to Energy: Environmental and Local Governmental Concerns*, 19 U. Rich. L. Rev. 373, 381 (1985) ("For a waste to energy facility to be successful, there must be a guaranteed supply of waste to assure continuous energy production. It would be very difficult to obtain financing or to find a ready market for the energy produced if there was no continuity of production. The duty of guaranteeing the waste supply will usually fall upon the local government. The amount of waste supply which can be guaranteed by the local government will depend upon whether the waste is collected by the municipality or by private haulers, and in turn, upon who decides where the waste will be disposed.").

In Clarkstown's case, as with many other communities, flow control has been determined to be an essential tool also to obtain financing for a new or upgraded waste facility.[34] Some cities can use general obligation bonds for such financing, but most find them so limited legally or politically that it is not a realistic option. A few wealthy communities or counties can afford to use general tax revenues to subsidize a waste facility as needed. But for many communities the only realistic, near-term option to finance a needed garbage treatment or disposal facility is to pledge the revenues of the facility and secure those revenues by requiring full community utilization of the new facility. The added cost of better waste handling facilities is passed through to local waste generators by private haulers, but, unlike a general tax or other subsidy, the higher costs of better garbage disposal are "internalized" by specifically impacting those who make decisions about packaging and other waste generating aspects of their purchases.

Based upon the long tradition of judicial deference to the needs of local governments to limit or eliminate private participation in local waste removal as they deem appropriate, cities have often simply taken over all collection and disposal functions or created public utility or franchising structures to ensure complete control over routes, charges, disposal options, and every other aspect of private participation. Clarkstown's program, one of the least restrictive, has hoped to realize economic and service benefits of a competitive private market for waste collection and recycling services as a component of its overall plan, but not in lieu of the essential governmental control needed to make the overall program work.

Thus, the local governmental need for control of waste flow goes to the very ability of municipalities to achieve long-term solid waste solutions that have nothing at all to do with local economic protection at the expense of out-

[34] *See Memorandum in Support of Holland-Gromack Bill,* R. 376.

of-state residents and businesses. The Third Circuit's decision in *J. Filiberto Sanitation, Inc. v. Department of Environmental Protection,* 857 F.2d 913 (3rd Cir. 1988), offers an excellent example of a local government managing the variety of problems associated with garbage collection, transportation and disposal, and evidences the need for the kind of control of local waste disposal at issue here. In *Filiberto* the record contained extensive evidence that the county plan requiring the processing of trash at the county's designated transfer station served to:

> assure that all trash produced within the county is properly disposed of; reduce truck traffic on county roadways; give the county an accurate gauge for planning purposes of the amount of waste generated; allow the county to enter into and meet long- and short-term contracts for final disposal, which are typically on a put-or-pay basis; and assure that all haulers, many of whom lack equipment for long-distance hauling, have a practical outlet for trash as the distance to landfills grows.

Id. at 920. In mandating that all local waste be brought to the county's transfer station, the county sought to comply with a comprehensive statewide plan to deal with New Jersey's garbage crisis. As required under state law, the county held a public hearing and allowed written comment by the public before adopting its flow control plan. *Id.* at 915.

The concerns addressed by the county in *Filiberto* are typical of those addressed by Clarkstown in enacting and implementing its solid waste policy. The Town Board adopted Local Law 9 following preparation of a full Environmental Assessment Form ("EAF"). J.A. 25. Before selecting Clarkstown Recycling Center, Inc., the Town Board requested proposals from companies wishing to build and operate the new transfer station, and allowed public comment on the proposals. J.A. 26. Authorizing a transfer station was part of Clarkstown's comprehensive

plan to reduce the generation of solid waste within the Town. Indeed, in 1988, Clarkstown implemented a voluntary recycling program, which was supplanted by a mandatory Town recycling program in 1989. Pet. App. 28. Clarkstown also maintains two composting sites where leaves and grass clippings are accepted for compost to eventually be returned to the soil as mulch and organic fertilizer. Pet. App. 29. Clarkstown's comprehensive control over the waste flow discarded within the Town limits enables it successfully to monitor and ensure compliance with its overall solid waste plan.

The Congress and Executive branch have also repeatedly recognized the responsibility of local governments to plan for and provide environmentally sound garbage programs,[35] and, in the *Hybud* case in which a similar ordinance was sustained under the Commerce Clause and the Fourteenth Amendment,[36] the Environmental Protection Agency and Department of Energy, as *amici,* stated that "flow control" laws mandating local waste disposal to ensure the feasibility of designated local waste facilities "accord with national environmental and energy policy." *Hybud,* 654 F.2d at 1191.

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[35] In enacting RCRA, 42 U.S.C. § 6901 *et seq.*, Congress found, "with respect to solid waste . . . that . . . the collection and disposal of solid waste should continue to be primarily the function of State, regional and local agencies . . ." 42 U.S.C. § 6901(a)(4). *See also* H.R. Rep. No. 1491, 94th Cong., 2d Sess. 11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6249; 42 U.S.C. § 6948(d)(3). The Environmental Protection Agency has, upon several occasions, also expressed this deference. *See, e.g., Agenda for Action, supra* note 17, at 22, 34; *The Solid Waste Dilemma: An Agenda for Action; Availability of a Draft Report and Announcement of Public Hearing,* 53 Fed. Reg. 36,883, 36,884 (1988).

[36] On a petition for *certiorari* raising the Commerce Clause and Sherman Act issues, the Court remanded for further proceedings on the antitrust issue and denied *certiorari* following the Sixth Circuit's reaffirmance of its decision upholding the "flow control" law. *See* 471 U.S. 1004 (1985).

This history and long-settled legal precedent is not disputed by Petitioners here, just ignored. But that history, and the very nature of local government's responsibility to handle locally discarded garbage, fundamentally negate the charge of economic protectionism. The implicit purpose of Clarkstown's Ordinance plainly is not to achieve some advantage for local residents or businesses at the expense of non-local residents or businesses, which is evidenced by the nature and incidence of the Ordinance's burdens. In *Philadelphia,* out-of-state interests needing access to landfill capacity were clearly burdened, competing New Jersey users of landfill capacity were clearly benefitted, and those burdened had no ability to change the burdening measures beacuse they did not vote in New Jersey.[37] In contrast, here the Clarkstown Ordinance burdens Clarkstown residents and businesses who must pay more to take their garbage to the Clarkstown facility than they would pay if they could shop for the cheapest site available outside of Clarkstown.[38] Clarkstown's residents, of course, are those who have complete control of the political process which can repeal or change the Ordinance if it is not in the best overall interests of the Town.[39] The nature of the Town's responsibility, the rational use of the Ordinance to bear that responsibility and the placement of

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[37] *Philadelphia,* 437 U.S. at 628. The reverse situation—and result—was seen in *Harvey & Harvey,* 600 F. Supp. at 1380. The court in *Harvey & Harvey* found it significant that the plaintiffs represented in-state rather than out-of-state economic interests because "the existence of major in-state interests affected by the Act is a powerful safeguard against legislative abuse." *Id.* at 1380 n.15 (quoting *Clover Leaf,* 449 U.S. at 473 n.17).

[38] "Obviously, a State that imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the State." *Sporhase,* 458 U.S. at 955-56.

[39] *Kassel v. Consol. Freightways Corp.,* 450 U.S. 662, 675 (1981); *Raymond Motor Transportation v. Rice,* 434 U.S. 429, 443 n.18 (1978).

the burden of the regulation primarily, if not entirely, on residents and businesses of Clarkstown, who are fully involved in the applicable political process, negate any charge that the Ordinance is protectionist in purpose. The net effect of the Ordinance is to disadvantage Clarkstown's own residents economically for the sake of their own local environment. This not not a protectionist purpose.[40]

One writer has noted that "in every case during the current era in which the Supreme Court has either characterized a state regulation as discriminatory or treated one as such, those outside the state subjected to greater burdens belonged to the same category as those inside the state advantaged by the regulation."[41] That central principle of the Court's decisions dictates the conclusion here that the Clarkstown law, which confers no economic advantage on its own citizens, and indeed assigns them the full burden of the law, does not effect an unconstitutional discrimination.

C. The Ordinance Has No Protectionist Effect.

Petitioners argue that a law requiring delivery of garbage to Respondent's facility for transfer has the effect of preventing its handling anywhere else, including out-of-state sites. They, of course, do not represent out-of-state

[40] Petitioners' attempted use of a Clarkstown official's expression of concern about the Town's loss of revenue due to the Carbone operations, Pet. Brief 26 (citing J.A. 11), deserves the same response the Court gave in *Maine v. Taylor*, 477 U.S. 131, 150 (1986): "We fully agree with the Magistrate that '[t]hese three sentences do not convert the Maine statute into an economic protectionism measure.'" The official's concern for the viability of the Clarkstown facility was plainly focused on the threat to Clarkstown's ability to continue its environmental program.

[41] Smith, *supra* note 25, at 1225-26. *See Clover Leaf*, 449 U.S. at 473 n.17; *Kassel*, 450 U.S. at 675. *See also* Tribe, *supra* note 10, at 409-10. *Cf.* Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1095 (1986).

transfer stations or disposal sites. They argue that the Carbone companies themselves, as interstate transporters or "brokers" of garbage transportation services, are the interests burdened, since their profits are affected by the required use of the Clarkstown facility. The party purportedly benefitted is the Clarkstown designated facility, because its economic viability is supported by the Ordinance. This analysis falls apart at every turn. First, the Carbone interest here is as a local Clarkstown commercial entity; it may have a desire to bring New Jersey garbage to Clarkstown and to take Clarkstown garbage to Indiana, but it is a local merchant, part of the local political process, who is precluded from competing with the Town by virtue of the Town's program for handling its garbage problem.[42]

Second, if this "burden" were cognizable in constitutional discrimination analysis, there is no counterpart "advantage" or "preference" to the Town. This Town, like all towns, just wants to get rid of the local garbage but has the responsibility to do so in an environmentally sound manner.[43] A local ordinance facilitating that program does

[42] Carbone's complaint is really in the nature of an antitrust claim, but the State of New York's Holland-Gromack Law, 1991 N.Y. Laws 569, specifically empowering the Town to restrict competition for this purpose, and the "state action" antitrust exemption expressed in *Parker v. Brown*, 317 U.S. 341, preclude that claim.

[43] In order to carry out its duties safely and efficiently, the Town needs to be able to ensure long-term stability in the management and disposal of solid waste. *See Agenda for Action, supra* note 17, at 14 ("Many existing facilities are closing either because they are filled or because their design and operation do not meet Federal or state standards for protection of human health and the environment. New facilities must be built to replace this diminishing capacity but must be environmentally sound, preserve valuable resources, and not present undue risk to human health. The incentive to build new, environmentally sound facilities and adopt better management practices may not exist in some areas because of the

not confer a "benefit" or "advantage" of the type this Court would view as indicative of a protectionist effect. "Protectionism" connotes competition. This is not a matter of competition between Clarkstown and Carbone. Clarkstown is a governmental body trying to carry out a core police power responsibility; Carbone is a private firm trying to profit from the demand for waste transportation services. The dissimilarity of their ends makes it plain that are not competitors and that Clarkstown's means do not effectuate economic protectionism.

Third, this case does not involve a conflict between in-state and out-of-state garbage disposal facilities. Clarkstown's transfer station consolidates local garbage for shipment to out-of-state landfills. There is no discriminatory effect in terms of out-of-state competitors for the disposal business (who are not parties here in any event) because the volume of garbage leaving Clarkstown is unaffected by whether the Town's or Carbone's transfer facility is involved. A state or local law regulating the manner in which goods enter commerce is not discriminatory. *Exxon*, 437 U.S. at 127-28; *Filiberto*, 857 F.2d at 921-22.

The Petitioners argue that the effect of the Clarkstown's effort is isolation, that the constitutional principle that we "sink or swim together," *Baldwin*, 294 U.S. at 523, is violated by Clarkstown's insistence upon handling garbage discarded within its borders. Petitioners have it backwards. Isolation is what happens when communities contribute to the problem of ever-increasing flows of garbage seeking ever-dwindling disposal resources and decline to contribute to a solution by ensuring proper disposal in

current practice of 'waste flight,' in which waste is shipped by truck or rail across state and county lines to areas with available capacity. If not done concurrently with long-term planning to solve the capacity problem for a region, the short-term solution of waste flight only delays the inevitable management problem in the locality shipping the waste, and hastens potential problems in the area that receives and disposes of the waste.").

new resources they create or join other communities in creating. Clarkstown's recycling and disposal program is part of a larger New York State plan to deal with their own part of the garbage problem. It is political action at the state and local levels that Congress itself has recognized as appropriate to address the need. This is not isolationist in any sense of the word. Petitioners' preferred system of unfettered interstate trash brokering is hardly a prescription for swimming together. It is their short-term "fix" that is sinking us.

If the control by Clarkstown of its locally discarded garbage could be viewed as discriminating in effect against Petitioners as "brokers" of interstate garbage transportation transactions, we submit that this effect would not establish an impermissible discrimination but would, at most, be a factor to weigh in the less rigorous inquiry under *Pike*. Professor Smith made this observation regarding the Court's treatment of discriminatory effect cases:

> If we consider this issue in the light of the reasons that the Supreme Court gives for disfavoring state discriminations, it is doubtful that all discriminations in effect are sufficiently harmful to warrant imposing a heavy burden of justification on the states. For example, discriminations solely in effect may be substantially less likely to provoke retaliation by other states than discriminations that can be discerned on the face of the regulation or that are thought to be purposeful. In the words of Justice Holmes, "even a dog distinguishes between being stumbled over and being kicked." [44]

The Clarkstown Ordinance "is a regulation of general application, designed to better the health and welfare of the community." *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 448 (1960). We submit that

[44] Smith, *supra* note 25, at 1251 (quoting Oliver Wendell Holmes, *The Common Law* 3 (1881)).

the "deeply rooted" distinction Justice Jackson articulated in *H.P. Hood,* 336 U.S. at 533, plainly applies here. Facially, and in purpose and effect, this local law claims both an historical heritage and a pressing public need to be recognized as a measure "to shelter its people from menaces to their health or safety." *H.P. Hood,* 336 U.S. at 533.

III. UNDER THE "BALANCING" CRITERIA THIS COURT HAS APPLIED TO NONDISCRIMINATORY MEASURES WHICH INCIDENTALLY BURDEN COMMERCE, THE ORDINANCE SHOULD BE UPHELD.

If the Court determines that "balancing" criteria of *Pike v. Bruce Church, Inc.,* 397 U.S. 137, are applicable in this case, it will consider whether the burden imposed upon commerce is "clearly excessive in relation to the putative local benefits." *Id.* at 142. We will address first the nature and extent of the burden alleged in the record of this case, then turn to the "putative local benefits" of the Ordinance and last address the constitutional principles that ought to apply in the "balancing" process.

A. The Trial Court Correctly Found No Showing Of A Burden On Commerce Here, And, Even On The Facts Petitioners Assert As To Burden, It Would Be *De Minimis.*

The record in this case as to an alleged burden on commerce consists of Petitioners' submission that they had been receiving waste from out-of-state and that the residue of garbage remaining after any removal of recyclables (which Petitioners were and remain free to ship anywhere they wish) was over 150 tons per week. Pet. App. 26a. They stated that they had been able to dispose of this residue outside Clarkstown at a price lower than that charged by the Clarkstown transfer station, which enabled them to charge a price for disposal to their customers of $11 per ton less than Clarkstown's price. Pet. App. 35a. The "burden" they assert is that the higher cost of taking these residues to the Clarkstown designated facility made Petitioners less competitive in their efforts to attract waste in interstate markets and thereby reduced the interstate flow of waste to their Clarkstown facility. Pet. Brief 31-33.

The trial court held that Petitioners "have failed to demonstrate that Local Law #9 has any 'demonstrable effect whatsoever on the interstate flow of goods,' " quoting from *Exxon,* 437 U.S. at 126 n.16, because "[r]egardless of whether the waste is shipped from the Clarkstown transfer station or the defendants' facility, it is destined for out-of-state landfills."[45] On rehearing, stating that Petitioners had failed to establish a burden on commerce based upon their showing of the Ordinance's impact on their own operations or "the operation of out-of-state entities with whom they are doing business," Pet. App. 20a, the court held that Petitioners had failed to prove a burden on commerce "clearly excessive" in relation to the public needs served by the Clarkstown Ordinance.[46] Pet. App. 19a. Affirming, the Appellate Division concluded that the Ordinance

> imposes no special fees, taxes, prohibitions, or duties on those transporting out-of-state articles of com-

[45] Pet. App. 30a. *See also,* Pet. App. 20a ("Defendants have failed to demonstrate factually the extent to which their operation or the operation of out-of-state entities with whom they are doing business, are being affected by this local law."). The court found Clarkstown's case to be identical to that in *Filiberto,* 857 F.2d 913, where the Third Circuit affirmed a District Court determination that no excessive burden on commerce had been shown. Pet. App. 30a.

[46] The court also rejected Petitioners' Fourteenth Amendment Due Process and Taking claims, because, "the provisions of Local Law #9 of 1990 'bear a reasonable relation' to the Town's legitimate purpose in controlling and regulating solid waste disposal within the confines of the Town." Pet. App. 32a.

> merce. Rather, the local law applies evenhandedly to all solid waste processed in the town, regardless of point of origin. Moreover, were we to assume that the presently existing $11 difference between the Town tipping fee and the fee the appellants have chosen to impose has any effect on the interstate flow of solid waste, there is no evidence before us which suggests that what can have nothing more than an incidental effect on interstate commerce is impermissibly burdensome, particularly when the 'burden' is weighed against the legitimate and significant public concerns underlying the local law.[47]

Pet. App. 11a-12a (citations omitted).

The sum total of Petitioners' burden case is that its waste business based in Clarkstown has become less competitive in interstate markets because the mandatory use of the Clarkstown transfer station raises the cost of residue disposal. This is, at most, an incidental and *de minimis* burden. It cannot be considered "excessive" in relation to the Town's local interest.

B. The Ordinance Is An Integral And Critical Part Of Clarkstown's Plan To Respond To Its Own Garbage Problem And Thus Represents A Substantial Local Benefit.

The issue Petitioners raise in this case in terms of "balancing" is not whether there are significant local benefits in the creation of an environmental facility such as Clarkstown's, but whether the Ordinance, requiring use of the

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[47] Rejecting Petitioners' Due Process claim, the appellate court addressed the argument that the Ordinance's primary motivation was to aid the Clarkstown transfer station as a competitive entity: "A concern for the continued economic viability of a solid waste management facility established pursuant to such a plan does not negate or detract from, but in fact is a part of the health, safety and environmental concerns such plan is designed to address." Pet. App. 10a (citations omitted).

facility, is a legitimate part of that program. Several lower court cases striking down similar local measures have come to their results by separating the public value of a municipal waste facility from laws mandating its full utilization.[48] This fragmentation of local government's role in managing garbage makes no legal or practical sense.

Because garbage is and has always been a nuisance rather than an article of value, there has been no private incentive to take on the full job of getting rid of it properly. Private firms are in abundance to remove the nuisance for paying customers, and there have always been resalable fragments of the waste stream one could pick up profitably. But the full job of getting all of the garbage off the streets, sidewalks, meadows, and elsewhere has always fallen to local government.[49] Recognizing that the failure or inability of cities to bear this responsibility causes intolerable health and safety problems for the general public, the courts have always respected the broadest reach of local police power in this area. Whether a city has found it best to take over the job exclusively as a public works function, to franchise or contract with private firms or to regulate competing private firms to ensure comprehensive service, the courts have consistently deferred to the cities and rejected claims by private garbage collectors under federal and state constitutions that their exclusion from the field or restrictions on their commercial opportunities offended the Due Process or Taking pro-

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[48] *Waste Recycling, Inc. v. Southeast Ala. Solid Waste Disposal Auth.*, 1993 WL 68651 (M.D. Ala. 1993); *Waste Syst. Corp. v. County of Martin, Minn.*, 784 F. Supp. 641 (D. Minn. 1992), *aff'd*, 985 F.2d 1381 (8th Cir. 1993); *Stephen D. DeVito, Jr. Trucking, Inc. v. Rhode Island Solid Waste Management Corp.*, 770 F. Supp. 775 (D.R.I.), *aff'd*, 947 F.2d 1004 (1st Cir. 1991).

[49] *California Reduction*, 199 U.S. 306; *Gardner*, 199 U.S. 325; *Hybud*, 654 F.2d at 1192.

visions.[50] The requirement that local garbage be brought to the Town's designated facility is no different in purpose or effect than any of the other long-accepted methods whereby local governments control the handling of local garbage. Seeking to create a facility that does the job and ensuring that facility is used and financially supported by local residents is one bundle.

This Court's decision in *California Reduction*, 199 U.S. 306, delivered by the first Justice Harlan, upheld a San Francisco ordinance identical in purpose to Clarkstown's Ordinance, although considerably more restrictive. After reviewing in detail the history of San Francisco's garbage problem and the difficulty its government faced in choosing among varying systems and methods for a comprehensive and effective system, the Court concluded that the Town had before it

> a most difficult problem—unsolved by experience or science—as to the best or most appropriate method of protecting the public health in the matter of the disposal of the garbage, refuse, and other materials found on private premises, and in hotels, restaurants, and like places. The state, charged with the duty of safeguarding the health of its people, committed the subject to the wisdom and discretion of the board of supervisors. The conclusion it reached appears in the ordinances in question, and the courts must accept it, unless these ordinances are, in some essential particular, repugnant to the fundamental law.

Id. at 321.

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[50] *California Reduction*, 199 U.S. 306; *L & H Sanitation v. Lake City Sanitation*, 769 F.2d 517, 522 (8th Cir. 1985); *Dirt, Inc. v. Mobile County Comm'n*, 739 F.2d 1562, 1565-66 (11th Cir. 1984); *State ex rel. Moock*, 166 N.E. 583; Annotations, *Regulation and Licensing of Private Garbage or Rubbish Removal Services*, 83 A.L.R. 2d 799 (1960); *Validity of Statutory or Municipal Regulations as to Garbage*, 72 A.L.R. 520 (1931); 135 A.L.R. 1305 (1941). *See* additional cases cited in note 29, *supra*.

California Reduction considered only the Fourteenth Amendment Due Process and Taking issues before it; no claim under the Commerce Clause had been raised. The case is nevertheless highly pertinent here. It is an excellent illustration of the long tradition of judicial deference to the efforts of local governments in dealing with the garbage problem and in limiting private participation in the field as needed. And, in the context of the "balancing" of an alleged burden upon commerce against public benefits, it addressed (in 1905, the "heyday" of Substantive Due Process)[51] the issue of whether a city has a valid purpose as to its "means" of mandatory local disposal to serve the "end" of solving the local garbage problem. *California Reduction* upheld the rational relation between a government's program to handle its garbage problem and its use of a restraint on private commercial handling of local garbage to make its program work. The Court upheld a fifty-year exclusive franchise to a private incinerator operator and a law requiring all discarded garbage, whether or not having some further use or value, to be brought to the designated incinerator. 199 U.S. at 325. This Court viewed San Francisco's plan to handle its garbage crisis by franchising an incinerator and its laws requiring community utilization of the incinerator as an inseparable and valid exercise of the City's police power. *Id.* at 321.

Just as this Court in *California Reduction* and *Gardner* deferred in applying the Fourteenth Amendment to the legislative judgments of the governments of San Francisco and Detroit, on the propriety of mandatory local garbage disposal ordinances to deal with their garbage problems, and as this Court deferred in *Clover Leaf*, 449 U.S. at 469, to the Minnesota legislature's judgment that banning non-returnable milk containers would serve the state's environmental objectives, the Court should also defer to the judgment of Clarkstown's government that

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[51] *Hybud*, 654 F.2d at 1192.

the Ordinance is necessary and appropriate to implement its waste removal program. Clarkstown is not "required to convince the courts of the correctness of their legislative judgments. Rather, 'those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.' " *Id.* at 464 (quoting *Vance v. Bradley,* 440 U.S. 93, 111 (1979)). Petitioners' suggestion that "flow control" should be rejected because it might not be the best alternative in a given case, Pet. Brief 27, is completely at odds with the constitutional standard. This Court stated in *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 524 (1959): "If there are alternative ways of solving a problem, we do not sit to determine which of them is best suited to achieve a valid state objective."

In *Glenwillow Landfill, Inc. v. City of Akron,* 485 F. Supp. 671, 680-81 (N.D. Ohio 1979), *aff'd sub nom. Hybud Equipment Corp. v. City of Akron,* 654 F.2d 1187 (6th Cir. 1981), *vacated,* 455 U.S. 931 (1982), *on remand,* 742 F.2d 949 (6th Cir. 1984), *cert. denied,* 471 U.S. 1004 (1985), where the court did reject Commerce Clause as well as Fourteenth Amendment claims, the district court said, "the ordinance [mandating disposal at the city incinerator] cannot be separated from [the incinerator] . . . [T]he ordinance is . . . part of the city's broader scheme to dispose of waste in a safe and sanitary manner at the [incinerator]. The ordinance is a reasonable means to achieve this reasonable goal." [52]

[52] *See Hodge v. Stout,* 377 F. Supp. 131, 135 (E.D. Tenn. 1974) (court upheld municipal ordinance requiring city residents to tie into municipal sewer system based upon two legitimate goals: to protect the public health and to insure payment of bonds issued for sewer purposes); *Pyeatte v. Board of Regents,* 102 F. Supp. 407, 415-16 (W.D. Okla. 1951), *aff'd,* 342 U.S. 936 (1952) (state policy requiring students to live in University-constructed housing in order to defray construction costs is not impermissible); *City of Sikeston v. Sisson,* 249 S.W.2d 345, 346-47 (Mo. 1952) (covenant

It would be contradictory to say the least if a local law restricting private competition as a means to achieve a concededly legitimate public purpose—a law expressly provided for by state statute for this public purpose, valid under the Fourteenth Amendment, and valid under federal antitrust laws by virtue of the "state action" exemption—would not be treated as having a legitimate purpose under the negative Commerce Clause.[53] Such a contrived fragmentation of a local government's handling of its garbage problem is antithetical to the tradition of deference by the courts to these public measures. If a city can validly build an incinerator to deal with its local garbage and can validly restrict private competition, it can surely direct the flow of its local waste to a designated facility for the manner of transfer, treatment or disposal it deems appropriate. The two valid actions are part and parcel of a single valid purpose under the Commerce Clause "balancing" criteria.

Cities, groups of cities, regional authorities, and other responsible public entities must consider a wide variety of tools to deal with their garbage problems. In many circumstances it is not feasible to finance new facilities if it is uncertain whether local waste might be diverted later to a cheap landfill operating under less stringent environmental standards.[54] Mandatory local use of these local

within city ordinance to require city property owners to connect to the city's sewerage system was valid). The same issues were presented and the same conclusions reached in *Prostrollo v. University of South Dakota,* 507 F.2d 775, 779 n.6 (8th Cir. 1974), *cert. denied,* 421 U.S. 952 (1975), and *Poynter v. Drevdahl,* 359 F. Supp. 1137, 1142 (W.D. Mich. 1972).

[53] *See Pennsylvania v. West Virginia,* 262 U.S. 553, 601-02 (1923) (Holmes, J., dissenting); *South Carolina State Highway Dep't v. Barnwell Bros., Inc.,* 303 U.S. 177, 190 (1938); *Sproles v. Binford,* 286 U.S. 374 (1932).

[54] *See* Outten, *supra* note 33, at 381.

processing or disposal facilities represents a major building block in local solutions to the problem rather than relying on other communities indefinitely. This Court has often noted the heavy burden that a party must carry in challenging a nondiscriminatory health or safety measure under the *Pike* criteria.[55] The enactment of laws mandating use of public garbage facilities is a matter not just of preference but of necessity in many communities if progress toward long-term local solutions is to be made. If commerce is in fact burdened by community environmental programs such as Clarkstown's, surely this is a case where it is "of greater importance that local interests be protected than that interstate commerce be not touched." *H.P. Hood,* 336 U.S. at 567 (Frankfurter, J., dissenting). Here there is no conflict between federal and local interests; they are in complete harmony.[56] If there is some unwritten hierarchy of "putative local benefits" in

[55] *Northwest Central Pipeline Corp. v. State Corp. Comm'n of Kansas,* 489 U.S. 493, 525-26 (1989); *Arkansas Electric Coop. Corp. v. Arkansas Pub. Serv. Comm'n,* 461 U.S. 375, 395 (1983); *Clover Leaf,* 449 U.S. at 728-29; *Raymond Motor,* 434 U.S. at 443-44.

[56] *See supra* note 35. In light of the enormous potential exposure of municipalities to third-party liability under the Comprehensive Environmental Response, Comprehension, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675, municipalities have a greater need than ever before to be able to monitor and control their own local waste flows. Municipalities that dispose of even trace amounts of household hazardous waste may be held liable for Superfund cleanup under CERCLA. *B.F. Goodrich Co. v. Murtha,* 754 F. Supp. 960 (D. Conn. 1991), *aff'd,* 958 F.2d 1192 (2d Cir. 1992); *Transportation Leasing Co. v. California,* 21 Envtl. L. Rep. 20826 (C.D. Cal. Dec. 5, 1990). Under CERCLA, any person or municipality that contributes to contamination of a designated Superfund site is liable for clean-up and recovery costs. The average clean-up cost for a Superfund site is approximately $24 million. William H. Rodgers, Jr., *A Superfund Trivia Test: A Comment on the Complexity of the Environmental Laws,* 22 Envtl. L. 417, 422 (1992).

the *Pike* balancing, few rank higher than those involved here.[57]

C. The "Balancing" Process Must Take Into Account The Different Roles Of Local Government And Private Waste Firms In Dealing With Garbage.

The "balancing" of Clarkstown's environmental interests against the Carbones' claim to freedom to pursue their business without restraint in interstate markets must take into account the larger issue of whether state and local governments and private enterprises are to be viewed under the law as co-participants and competitors or whether it is the cities' role to lead in this field and the role of private firms to meet the market demands that follow the governmental planning, building and regulating process. Obviously, if local governments are viewed under other laws and other parts of the Constitution as having the power to supplant private participation when necessary to carry out their garbage disposal programs, they and private interests cannot be treated as equal participants in the field for Commerce Clause purposes.

The circumstances of the present case offer a good illustration of the incompatibility of public and private

[57] Paraphrasing Justice Scalia's concurring opinion in *CTS Corp. v. Dynamics Corp. of America,* 481 U.S. 69, 95-96 (1987), if the Clarkstown Ordinance "governs only its own [residents] and does not discriminate against out-of-state interests, it should survive this Court's scrutiny under the Commerce Clause, whether it promotes [more efficient or less efficient garbage disposal]. Beyond that, it is for Congress to prescribe its invalidity." The same view is expressed in *Bendix Autolite Corp.,* 486 U.S. at 897 (Scalia, J., concurring). *See also* Regan, *supra,* note 41, at 1094-95, 1099. A similar reading of the Commerce Clause is found in *Norfolk Southern Co. v. Oberly,* 882 F.2d 388, 401 (3rd Cir. 1987), and *American Trucking Ass'n v. Larson,* 683 F.2d 787, 795 (3rd Cir. 1982). *See also* Julian N. Eule, *Laying the Dormant Commerce Clause to Rest,* 91 Yale L.J. 425, 469-72 (1982); Tribe, *supra* note 10, at 410-11.

objectives and demonstrate why the same historical deference the courts have accorded public responsibility in this field under the Fourteenth Amendment is especially fitting in the "balancing" process under *Pike*. It is undisputed here that the "commerce" alleged to be implicated in this case consists of interstate movement of garbage in violation of the laws of all three affected jurisdictions: the generating state, New Jersey; the receiving state, New York; and the receiving community, Clarkstown. New York and New Jersey are among the states facing the most serious waste disposal crises in the country,[58] and the laws being violated represent their attempts to make their comprehensive statewide recycling and waste disposal plans work. Clarkstown also is trying to carry out its local solid waste plan by ensuring that waste discarded in its community, regardless of origin, is reduced in volume to the maximum extent possible through composting and recycling and then safely directed through its transfer station to suitable disposal facilities.

Carbone, of course, is not violating any laws if they are not constitutionally valid. But, whether they are valid includes the question whether there is a federal interest in fostering private participation is this field which is of higher value than the state and local interests reflected in the programs of New York, New Jersey and Clarkstown. The Commerce Clause "does not elevate free trade above all other values." *Maine v. Taylor*, 477 U.S. at 151. If the long-respected primary responsibility of state and-local government for garbage disposal is to be shouldered by them successfully, we submit that the "free trade" advo-

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[58] *See* Michael R. Harpring, Comment, *Out Like Yesterday's Garbage: Municipal Solid Waste and the Need for Congressional Action*, 40 Cath. U. L. Rev. 851, 852 n.4 (1991) (citing Jon R. Luoma, *Trash Can Realities*, Audobon, Mar. 1990, at 86, 88); David Pomper, *Recycling Philadelphia v. New Jersey: The Dormant Commerce Clause, Postindustrial "Natural" Resources, and the Solid Waste Crisis*, 137 U. Pa. L. Rev. 1309, 1309-10 (1989); *Agenda for Action*, *supra* note 17, at 12.

cated by the Petitioners in this case cannot be given controlling weight on the *Pike* scales.[59]

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[59] The brief of *amici curiae* Incorporated Villages of Westbury, Mineola, *et al.*, seems to have been filed in the wrong case in the wrong court. The State of New York, responding to the seepage of waste into Long Island's water supply, banned all landfills on Long Island and enacted legislation to empower the Town of North Hempstead to enact a Town-wide flow control ordinance and establish a Solid Waste Management Authority responsible for the disposal of all solid waste in the Town. Brief for *Amici Curiae* Incorporated Villages of Westbury, Mineola, etc. ("Westbury Brief") 11-15. After Town tipping fees climbed as high as $104, many of the *amici* Villages entered into contracts to divert their waste to a cheaper private facility, prompting the Town to sue the Villages to enforce its flow control law. *Id.* at 18-21. The New York Supreme Court, Appellate Division, declared the Town flow control law constitutional and enjoined the Villages from violating it. *Town of North Hempstead v. Village of Westbury*, 182 A.D.2d 272, 588 N.Y.S.2d 293, *appeal dismissed*, 80 N.Y.2d 1023, 592 N.Y.S.2d 671 (1992). In arguing that the Clarkstown flow control ordinance violates the Commerce Clause, the *amici* make the point, wholly inapplicable to Clarkstown, that regionally administered flow control laws "severely affect the powers, responsibilities, and taxes of those other legal governments that actually collect the solid waste." Westbury Brief 38-39. Whatever the merits of their grievance with New York's apportionment of municipal power, they have nothing to do with this case other than to provide a good example of how flow control, managed by *some* governmental unit, is effective in cleaning up an environmental disaster.

CONCLUSION

The judgment of the Supreme Court, Appellate Division, Second Department of the State of New York should be affirmed.

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